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**IS USING MINORITY LANGUAGES IN THE WORKPLACE A CIVIL RIGHT?
A HUMAN RIGHT? NEITHER?¹**

Students of language in American society generally have some familiarity with issues of immigration as they relate to the domain of education because bilingual education has been the subject of intense public debate, academic research, and legal mandate. Indeed, bilingual education in various forms is part of what Klaus (1977) has termed “the American bilingual tradition.” They may likewise be aware of issues of immigrant languages and practical matters like the need for interpreting services in medical settings or civic matters like ballots in a language immigrants can read. In contrast, they are far less aware of the legal issues and controversies surrounding languages other than English, sometimes immigrant languages, in another important domain, the workplace. In this presentation, I seek to provide you with some information about this small, but significant part of American law on this topic. The number of cases involving these laws continues to grow at a rapid rate, and at least during the years of the Clinton administration, the Equal Employment Opportunity Commission, that arm of the federal government responsible for enforcing Civil Rights laws, filed about 20 cases a year, often helping plaintiffs reach out of court settlements (Shim 2000, cited in Krahnke et al. 2003).

To achieve my goal, I will, as noted in Roman I. on the handout, first explain my own experience with these rules and offer some necessary background about the U.S. legal system. I will then offer and analyze an example from a real-world workplace situation and discuss the Civil Rights guidelines that are relevant to “English-only in the workplace” rules. Next, I consider the justifications the courts have accepted in permitting such rules and analyze the language ideologies behind these acceptable justifications. I contend that studying the rulings of various courts with regard to these rules and the ways in which they compare offers important insights into the competing language ideologies that are found in this country and that in many ways help constitute our society, distinguishing it from others. They likewise present an interesting lesson in humility: in my own experience seeking to work with attorneys on these matters, I have been reminded of the incommensurability of disciplinary categories. In other words, matters that seem for taken-for-granted among American linguistic anthropologists and sociolinguists become much more complex when viewed through the lens of the facts of specific situations that arise in the workplace and in American law.

Finally, I offer some reflections on the consequences of thinking about minority language issues in terms of civil rights or human rights, a framework often used by some European researchers when arguing about these topics. Before proceeding, let me remind my listeners that

¹ Special thanks to my research intern, Taryne Hallet, for assistance in locating some of the materials used in this talk and for lively discussion of these issues. Thanks also to the UT Graduate School for providing me with a research intern to work on this project. Thanks likewise to the plaintiffs and attorneys who have shared their experiences and knowledge with me.

I am not an attorney and I am not authorized to interpret the law, in the sense that Bourdieu (1991) uses the notion of authorization. In other words, I speak only as a sociolinguist.

MY INVOLVEMENT WITH THESE ISSUES

I first became aware of these laws about three years ago, when I was asked to serve as an expert witness in a case, *Equal Employment Opportunity Commission v. University of Incarnate Word*, involving a group of housekeepers at a private university in San Antonio who claimed that their employer enforced an inappropriate and even illegal “English-only in the workplace rule” that prohibited them from speaking Spanish at work. More recently, I was asked to serve as an expert witness in a second case, *Egar et al. v. General Plastics et al.* in Tacoma, Washington, involving immigrants from Cambodia and the Philippines. Both cases settled out of court, the first for \$2.4 million, which was, at the time, and likely remains the largest settlement in an English-only-in-the-workplace ruling. Given what I understand about the facts of these cases, the matter of “English-only in the workplace” rules was but one small part of these cases; in other words, the plaintiff’s grievances and evidence for those grievances extended far beyond these rules. Thus, whatever role my opinions or deposition may have played in the decision of the defendants to choose a negotiated settlement, it was likely quite limited. At the same time, the issue of English-only in the workplace rules was significant in both cases.

Acknowledging the diversity of my audience, let me offer a bit of information about the American legal system as well as expert witnesses and the role they play in that system. Most cases, of course, are tried by juries of citizens who determine the case’s outcome after they have heard the versions of the facts presented by witnesses for each side—the plaintiffs and the defendants—and after they have been told by the judge which laws are relevant to the case at hand. Thus, the jury ultimately decides which facts or which version of the facts in the case is relevant as the law in question applies to those facts. Should either side be unhappy with the outcome of the trial and be able to show that procedural errors occurred or that the law was misinterpreted, it can appeal to a higher court. In appeals courts, there are no juries: only judges hear cases, and their concern is matters of law, not matters of fact.

The relevant appeals courts in English-only in the workplace cases are the federal courts of appeals, courts that have jurisdiction over federal laws as applied in a circuit, or group of states. After an appeal in a federal circuit court, one’s only recourse is an appeal to the Supreme Court, the highest court in the land. As we’ll see, the only grounds for bringing a language-based case in American law are, as I understand it, civil rights statutes, which automatically make the case a federal one. While the 12 federal circuit courts of appeal do not disregard the rulings of their peer courts when ruling, they are independent of one another. Thus, this system of circuit appeals courts results in a situation where different parts of the country can be bound by different legal precedents at any given time.

Currently, the Supreme Court has never ruled on the issue of English-only rules in the workplace. In order for it to do so, the Court would first have to agree to hear a case on this topic, which entails an appeal in such a case first being filed with the Court. For such an appeal to be filed, a relevant case—and one that would permit the Court to deal with important matters of law—would have to present itself. In the two cases I have been involved in, out-of-court settlements have occurred. In other words, both parties, perhaps fearing the possible outcome if the case had gone to trial, decided it was better to negotiate a mediated settlement before trial rather than to risk the result if the case went to trial. While such settlements are in many ways good for both parties, they leave basic legal issues unresolved. In this specific situation, what we currently find in the U.S. is a patchwork of federal circuit court decisions about specific cases

dating from different times. In other words, the courts do not speak with one voice. No court or ruling has succeeded in drawing what attorneys term “a bright line” distinguishing between permissible and impermissible English-only in the workplace rules. It is precisely because of the unsettled nature of the legal issues in English-only-in-the-workplace laws that they are such a fertile ground for analysis of language ideologies.

Here, permit me to discuss one more issue in American jurisprudence: the nature and role of expert witnesses. In any American court case, either side has the right to call an expert witness to provide testimony on factual matters (rather than legal ones). As one would expect, there are criteria for who can and cannot likely serve as an expert. In the two cases I mentioned, I was engaged as an expert witness because of my own research and graduate-level teaching on bilingualism and multilingualism and on codeswitching, topics that were relevant in these cases. Once engaged, expert witnesses are asked to respond, usually in writing, to one or more queries, questions relating to what are assumed to be matters of fact in the witness’s domain of expertise that are deemed by the attorneys to be relevant to their legal theory, i.e., the arguments they plan to put forth with respect to the facts and relevant laws, should the case go to trial. These expert opinions then become part of the evidence considered in the case as do any depositions or testimonies in court given by the witness.

WHAT IS AT ISSUE WITH “ENGLISH-ONLY IN THE WORKPLACE” RULES

In the two cases in which I have been involved, groups of employees believed that they were being subjected to an “English-only in the workplace” rule that did not fall within the guidelines of the law. That is, they were being prohibiting from speaking what the law terms their “primary” language. Interestingly, it is not only speakers of minority languages who sometimes raise complaints, as can be seen in number II. on the handout, which is a letter written to an on-line advice columnist, HR Guy, who offers advice about Human Resources issues.

Dear HR Guy,

I work for a company where the majority of the employees are Asian (Chinese) including the CEO. There have been complaints from non-Asian employees about the fact that the Asian employees are always speaking Chinese even while conducting meetings. This makes them very uncomfortable. Are there laws or rules about speaking English in the workplace?

Signed,

Language Barrier

In this case, speakers of English are unhappy because other employees often speak Chinese, including during meetings at which, we presume, employees who do not speak Chinese are present, perhaps mandatorily. Those in the room with any knowledge of the Anglo-American tradition of sociolinguistics or linguistic anthropology might immediately begin analyzing this situation in terms of different cultural interactional styles, thinking about the work of John Gumperz, or differences in the construction of face, thinking about the work of Brown and Levinson. Whatever paradigms we might invoke, we are left with two very different possible sets of perceptions with complex consequences. One might argue that the Chinese speakers are simply “doing what comes naturally,” i.e., speaking Chinese with one another and using language choice to mark intended hearer.

On the other hand, those who do not speak Chinese are “uncomfortable” though the exact nature of their discomfort is not specified. We might imagine that they are concerned that the speakers of Chinese are talking about them in their presence, a common complaint made by English speakers when other languages are spoken in their presence. Although many of us who are bilingual to any degree can recount stories demonstrating that such a fear is often no more

than good old American paranoia, we can likewise discuss cases where we and others have used our “other” language as a secret code or as a device of exclusion. More importantly, we have to admit that in the case cited, those who do not speak Chinese may feel they are being deprived of information that is crucial to their success at the company—and they may well be right.

A policy that requires everyone to speak English may place a burden on those who also speak Chinese; only the courts can decide if, in the eyes of the law, such a burden is undue. Equally significant, a policy stating that speakers can use whichever of their languages they wish will likely leave some employees feeling, well, uncomfortable for whatever reasons and may have pernicious consequences of various sorts. Although our theories of cross-cultural communication may seek to be practical, they cannot claim the wisdom of Solomon, and they do not include an “answer key” with solutions to real world situations like this one.

With this case in mind, let us consider when, according to the law, American employers can create and enforce a policy mandating English-only in the workplace. As noted in Roman III on the handout, in “Appendix A.Part 1066: Guidelines on Discrimination Because of National Origin” of Title VII of the Civil Rights Act of 1964, as amended, we find a discussion of national origin discrimination, which “includ[es], but is not limited to, the denial of employment because of an individual’s, or his or her ancestor’s origin; or because an individual has the physical, cultural, or **linguistic** characteristics of a national origin group” (§1606.1, emphasis added). As many of you will realize, national origin is a protected category because “the Civil Rights Act of 1964, as amended, protects individuals against employment discrimination on the basis of race, color, sex, or national origin.” Later in the appendix, the regulations note, “The primary language of an individual is often an essential national origin characteristic” (§1606.7). Thus, use of a language other than English in the workplace may be protected, but if it is, it is a matter of civil rights in this country. Further, the law sets up the idea of language as a possible “essential” characteristic relating to national origin, a kind of argumentation that many linguistic anthropologists and sociolinguistics, in the spirit of Boas, spent much of the twentieth century trying to get away from. At the same time, I believe there are possible ways of reasoning about essentialism as enshrined in the law that may make it possible for linguistic anthropologists and sociolinguists simultaneously to use contemporary notions of practice and social constructivist notions of identity while setting up the sorts of “essential” links necessary to pass the scrutiny of the law.

Before moving on to consider the conditions under which English-only in the workplace rules might be acceptable, it is important to note that the EEOC Guidelines I’ve just been cited are not unproblematic in themselves. They do not exactly have the status of law, and parts of the guidelines have been rejected by certain federal circuit courts while others have deferred to the guidelines as written.

ACCEPTABLE “ENGLISH-ONLY IN THE WORKPLACE” RULES

The comments in the appendix just cited and subsequent rulings make clear that English-only rules cannot apply at all times (i.e., before or after work or during break or meal times) but that they must be justified as a “business necessity.” Discussion is also included of the nature of the notice of the rule that employees must be given, including the consequences for violating the rule. Roffer and Sanservino (2000, 177), in a recent article for human resources personnel, noted that various court rulings across the years have supported English-only policies as a business necessity for four sorts of situations, which are given in Roman IV on your handout:

(1) Reducing ethnic tension, especially where separate languages have segregated an employer’s workforce.

(2) Improving employees' English proficiency, especially in companies with a primarily English-speaking customer base.

(3) Enhancing the effectiveness of employee supervision.

(4) Promoting safety and efficiency in the workplace.

As I've noted elsewhere (2001), justifications 1 and 2 make interesting assumptions about language and its nature. Justification 1 represents what Kirtner (1995) has termed a majority-centric perspective on language, namely, harmony will result if we all speak English, regardless of what the cost of speaking English may be for those who are bilingual. Justification 2 seems very much out of line with research on second-language learning: surely an English-only rule can only raise the level of a learner's affective filter, and as those of us who have taught language know, oral practice alone does not guarantee improvement in proficiency. Number 2 likewise assumes a population of English language learners, rather than, say, a population of native bilinguals, for whom codeswitching may be what Poplack (1979/80) termed "a mode of communication" or a mixture of English language learners and native bilinguals, as was the case in *EEOC vs. Incarnate Word*.

Justifications 3 and 4 raise other issues. Both presume that a monolingual workplace (at least during worktime) will guarantee an effectively supervised and a safe and efficient workplace. Reality is likely more complex. In his response to the email with which I began this section of the paper, HR Guy wisely in my opinion, noted,:

The employees have the right to ask that a common language all employees can understand be spoken in meetings. If a common language doesn't exist- if some employees don't speak English, and others don't speak Chinese- there should be a translator present at all meetings or functions in which business will be conducted.

In the two cases I've been involved in and in other cases I've read, the issue of interpreters has not come up except as an employer convenience, never as something that would benefit employees (and certainly not as an employee right). The possibility of translators or, more properly, interpreters, raises a host of problems in itself. Who will serve? Who is qualified to serve? Will the service be compensated? In many cases, in the U.S. at least, interpreter services are poor, when they exist at all. A dissertation student whose work I helped supervise reported that in the East Austin public health clinic where he worked as a paid Spanish/English interpreter, young children sometimes had to serve as interpreters for their monolingual mothers, even during gynecological exams.

Interestingly, during interviews with some of the plaintiffs in the most recent case in which I served as a witness, I posed the following question to several of the Cambodians:

If an English-only policy at General Plastics is enforced so that when interacting with another Cambodian on the job, you can speak English or remain silent, what would you do?

All those who were asked this question reported that they would remain silent; in other words, cultural practices—and these practices clearly relate to matters of national origin, of course—would lead them to choose silence over speaking English (rather than Cambodian or mixing the two) when addressing a fellow Cambodian. Such a situation is quite unlikely to encourage safety or efficiency during the workplace. In fact, many of the employees reported violating the English-only policy precisely to seek help or information from another Cambodian or Filipino in order to do a better job of the task at hand. We can easily imagine that most monolingual Americans (and many bilingual ones) would behave similarly if they found themselves working in a country where English was not the dominant language. Yet, many of us would also claim that the non-Chinese speaking employee who penned the email signed

“Language Barrier” should not be excluded from at least certain interactions that take place in his or her workplace, even though many of the employees prefer Chinese or use Chinese when codeswitching with one another. Further, even though sociolinguists and linguistic anthropologists may believe they are able to find problems with the situations in which the court has supported English-only in the workplace rules, only when the courts are called upon to consider these potential problems or when the legislature passes explicit laws about the nature and limits of English-only rules in the workplace can the legal situation of English-only rules in the workplace change.

LANGUAGE IDEOLOGIES AND THE COURTS’ POSITION

Having considered the nature of the EEOC guidelines and some of the rulings on English-only in the workplace rules, let us reflect a bit on the language ideologies that seem to underlie the court’s thinking. As noted, Kirtner (1995) has written of the majority-centric perspective on these matters, I would offer a slightly different analysis of the courts’ ideologies. First, the court rulings all envision a balanced bilingual, i.e., one with equal abilities in both languages, and treat this bilingual as the paradigmatic case of bilingualism, despite the rarity of such individuals in the real world and especially in the United States. Further, as I like to say, a metaphor to characterize the court’s understanding of bilingualism is standing in front of an ice cream counter and choosing between chocolate and strawberry ice cream when one likes both and is allergic to neither. In other words, language choice is just that: a “choice” or a “preference,” both terms used in court rulings, and a free choice or preference with no real consequences, an idea that flies in the face of much research in linguistic anthropology and sociolinguistics. I have pointed out in my 2001 article that our own theorizing about codeswitching in which notions of speaker agency and choice are front and center certainly have not discouraged such thinking. In other words, our metaphors as specialists have done nothing to challenge common monolingual ideologies of bilingualism and its nature.

WHAT KIND OF RIGHT ARE WE TALKING ABOUT?

In the time remaining, I want to return to my title: “Is Using Minority Languages in the Workplace a Civil Right? A Human Right? Neither?” As I’ve made clear, if a worker in the U.S. workplace is going to make a claim about the right to speak a language other than English, he or she must make a claim about a civil right. Might there be other possible worlds? Indeed, there are. First, here in the U.S., one especially influential ruling about English-only rules in the workplace from *Garcia v. Gloor* (1980) made the following statement:

No authority cited to us gives a person a right to speak any particular language while at work; unless imposed by statute, the rules of the workplace are made by collective bargaining or, in its absence, by the employer.

One might interpret this passage to claim that the right to speak *at all* in the workplace is a right gained through collective bargaining or one granted by the employer, a perspective many of us might find troubling even if not necessarily surprising.

Another possible perspective comes from recent research in Europe on linguistic human rights, most often associated with Tove Skutnabb-Kangas and associates (e.g., Skutnabb-Kangas & Phillipson 1995b). Many of you will be familiar with this work, which often cites supranational covenants like declarations of the United Nations or the European Union as basis for their claims. In defining the notion, Skutnabb-Kangas and Phillipson write, as given in Roman V on the handout, that they

will provisionally regard linguistic human rights in relation to the *mother tongue(s)* as consisting of the right to identify with it/them, and to education and public services through the medium of it/them. Mother tongues are here defined as “the language(s)

one has learned first and identifies with" (...). In relation to *other languages* we will regard linguistic human rights as consisting of the right to learn an official language in the country of residence, in its standard form. (1995, 71).

Although the essays in the volume cited here do not consider the sorts of conflicts that come up in "English-only in the workplace rule" cases, it is clear that Skutnabb-Kangas would consider them abuses of linguistic human rights because at the end of the introduction to the volume, we find a series of boxes of text, each containing a short description of a situation, all with the final line "This is a question of linguistic human rights," including the following one, which is presented in Roman VI as written:

The electrical company Philips has officially forbidden employees at their factory in Denmark to speak anything but Danish on the premises (1990). Turkish women who do not know much Danish cannot talk to each other at all. When asked on TV about whether Philips guests from other countries were also asked to speak Danish on the premises, the director said that English of course was a completely different matter. This is a question of linguistic human rights.

(Philipson, Rannut, & Skutnabb-Kangas 1995, 20).

While it doesn't take too much work to imagine cases in which the language(s) with which someone identifies with may not be the language or languages learned first and while few, if any of us, are interested in saying anything unkind about human rights and especially the rights of Turkish factory workers anywhere in the world, I am more interested here in considering the consequences of examining the framing of the debates over the issues treated here: what does it mean to consider language as a civil right? as a human right?

Although I am certainly not equipped to answer this question, it is worth considering. In many cases, two categories of rights seem indistinguishable. Generally, however, it seems, human rights encompass both what are termed natural rights—those with which we are born such as the right to basic necessities—and civil rights—those that result from the laws of the polity in which we live. At the same time, it is safe to say that over the past few centuries, rights that had been considered civil rights have been redefined as human rights. In his analysis of human rights, Nickel (2003) explains that particular rights can come to be considered human rights in four ways, and these are given on the handout as Roman VII:

- 1) as a shared norm of actual human moralities
- 2) as a justified moral norm supported by strong reasons
- 3) as a legal right at the national level (here it might be referred to as a "civil" or "constitutional" right) or
- 4) as a legal right within international law

(Nickel 2003)

He notes further that "the aspiration of the human rights movement is that all human rights will come to exist in all four ways," and we would likely be safe in attributing such aspirations to those who employ the paradigm of linguistic human rights. Certainly, they would hope to see condition 4 met; indeed, arguing on the basis of various declarations and charters, they claim it has been met. Similarly, they might claim that condition 3 has been met or lobby for its being met. Clearly condition 1 has not been met; otherwise, there would be little need for the movement. And it is ultimately condition 2 that I am, in some sense, questioning. Exactly what strong reasons do those who might see ourselves as supporting minority language rights give to justify the creation of a moral norm, particularly given the complexity of situations like the ones that show up in U.S. court cases involving English-only in the workplace rules?

In enumerating the characteristics of human rights, Nickel likewise notes that “human rights are minimal rights”—the least we might insist on, not the most we might want. He notes further that human rights are “rights, but not necessarily in the strict sense.” For example, “they have addresses who are assigned duties or responsibilities”; i.e., there are polities or organizations at various level responsible for ensuring the rights are protected, but, as he further states, it is generally the ‘national address’ that ensures the right with the some international group or agency acting as a backup or playing a secondary role. In evaluating the importance of the Universal Declaration of Human Rights, he notes its significance at setting the agenda for subsequent, similar projects, but notes that it has met with far less success, “in gaining real compliance with its norms rather than lip service to the general idea of human rights.” Hence, we might argue that the notion of human rights, while promising, may ultimately not be able to ensure minority language rights, however defined.

The notion of civil rights as a framework may offer some alternative possibilities though it not without problem. Civil rights are often defined as “rights that constitute free and equal citizenship and include personal, political, and economic rights” (Altman 2003). As all in the room no doubt know, the discussion of civil rights in the U.S. cannot be separated from our history, specifically the Civil Rights Movement, which sought basic rights in these categories for African Americans. Considering that example, it should be clear that laws regarding civil rights are often concerned with preventing discrimination. In his survey of civil rights, Altman (2003) explains there are often considered to be three generations of civil rights, each broader than the previous one. The first involved basic political rights as well as the right to due process and to enter into contracts; the second, more controversial and certainly not enshrined in American law, involves welfare rights, including the right to “food, shelter, medical care, and employment”; and the third, which is the most recent and the most controversial, involves “rights of cultural membership,” which would include language rights for cultural minorities. As Altman further points out, American law does not provide “protections of language rights or multiculturalism”; perhaps he is unaware of the cases I have treated in this paper or well aware of them, he does not consider the limited nature of the protection afforded worthy enough to merit mention. At the same time, Altman acknowledges that civil rights laws generally are not limited to protecting citizens although non-citizens may be afforded only partial protection. After the events of September 11, however, the scope of the protection for non-citizens and for some naturalized citizens has without a doubt diminished within the U.S.

At the same time, we must acknowledge, as does Nickel, that it is the nation-state, rather than a group or polity at a higher level, that is usually the address of the rights: by definition, the nation-state is the address of civil rights and it is, in most cases, the address of human rights. It is likely for this reason that Canovan has noted, “the fundamental human right is therefore the right to *have* rights, which means the right to belong to a political community” (1992, 34, cited by Spencer and Wollman 2002, 153). A concern of many of the speakers at the conference is the extent to which the groups they are discussing, immigrants of various provenance and differing legal statuses and, in some cases, their descendants, are or can be said to belong to the political communities in which they reside, whether in some imagined sense (as Anderson 1991 describes) or in some more real and tangible way. One challenge I have been presented with by my own work as an expert witness in cases involving English-only rules in the American workplace is examining why I might hold the personal or professional beliefs I do about the the situation of minority language speakers, what kinds of rights they might have, if any, and what strong reasons I might offer to justify those rights, however construed, whether as a moral norm

in the framework of human rights or as rights that falls within the scope of the Title VII Guidelines or the laws of other nations. Because of the power of the law as a discourse that certainly disciplines and often punishes, I wish to claim that facing this challenge would be a useful exercise for us all—for our own sakes and for the sakes of those we study.

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